

Neutral Citation Number: [2021] EWHC 128 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Date: 28/01/2021

Before :

HIS HONOUR JUDGE COTTER Q.C.

Between :

MICHAEL GIFFORD-HULL

Claimant

- and -

PAROLE BOARD FOR ENGLAND AND WALES

Defendant

-and-

SECRETARY OF STATE FOR JUSTICE

Interested party

Stuart Withers (instructed by Kesar and Co) for the Claimant
Yaaser Vanderman (instructed by the Government Legal Department) for the Defendant

Hearing date: 19th January 2021

JUDGMENT

Introduction

1. The Claimant brings a claim¹ for judicial review in respect of two decisions made by the Defendant during his pre-tariff parole review.
2. The first challenge concerns a decision of the Defendant, made by a panel chair on 18th December 2019, that the victim’s personal statement made by the Claimant’s adult son should not be disclosed to him in full, rather a ‘gist’ of the statement should be served instead (with a full copy provided to the Claimant’s solicitor upon the giving of an undertaking not to disclose its content to the Claimant).
3. The second challenge concerns the Defendant’s final assessment of the Claimant’s risk made on 25 March 2020, whereby it found that he posed a high risk of serious psychological harm to his adult children and refused to recommend his transfer to open conditions to the Interested Party.
4. The Defendant responded to the claim and stated that whilst it was not actively defending these two decisions it sought guidance from this Court on a range of issues. The Interested Party has not substantially participated in this claim.
5. Permission to challenge the decisions on three grounds (with an extension of time to pursue the first ground; a challenge to the decision of 18th December) was granted by His Honour Judge Lambert on 16 October 2020.

Facts

6. On 7th November 2006 the Claimant was sentenced to a mandatory life sentence with a tariff of 17 years (less 1 year and 33 days on remand) for the murder of his wife. His tariff expires on 5th October 2022, when he will be eligible for release by the Parole Board. He is currently located at HMP Erlestoke as a category C prisoner.
7. It is necessary to briefly outline some of the facts surrounding the murder. I take the following from the decision letter of 25th March 2020. The Claimant² strangled his wife whilst they were at home. The trial Judge observed that exactly what happened will never be known and continued:

“... after you had killed her you concocted an elaborate and skilful deception for the next three weeks upon everybody, but particularly upon the police, who were sent chasing false trail after false trail by you. They investigated North Cornwall, Finland, a chain of hotels, a host of bed and breakfast places to mention only a few leads, all while following up ideas thoughtfully supplied by you whilst cultivating this deception.
And, third, that you compounded those deceptions by the disposal of your wife's body which involved you, after careful thought and planning, desecrating it in a way that must have caused the greatest imaginable distress to those who truly loved her and by that I mean her family and eventually, when they come to

¹ Issued on 17th June 2020.

² Who had no previous convictions.

realise the enormity of what you did, her and your children”

and

“You claimed to the police with breath stopping hypocrisy that as you dragged her body you were talking to her comfortingly, just as you were to claim to the jury that this massive cover up was mounted solely in order to protect your children with no thought for your own position and that that explains your failure to summon any kind of help for your wife. Having watched and heard you in the witness box for three days I have no doubt that while concern for your children may have formed a comparatively minor part in your overall thinking, your prime concern was an old fashioned murderer’s desire to save yourself from discovery and to achieve that aim you were prepared to do in your desperation whatever was necessary”

and

“You were described by expert witnesses as being emotionally blunted, exhibiting unusual personality traits which fall short of an actual personality disorder. Others might put it in rather stronger terms and conclude from the evidence as a whole that you are callous, calculating and devious on an astonishing scale and that overall you are a man who is totally and utterly heartless.”

8. Between January 2018 and January 2019, the Claimant’s case was considered for a pre-tariff sift. This is a process initiated by the Secretary of State to determine whether a prisoner’s case should be considered by the Parole Board, before tariff expiry, to determine whether they can be managed in open conditions. A successful placement in open conditions is, in effect, a pre-condition for eventual release on licence.
9. On 15th January 2019 the Claimant’s case was referred to the Defendant, who was invited to consider whether the Claimant was ready to be moved to open conditions.
10. As a result of the referral, a number of reports were generated in order for the Defendant to fulfil this task. References/reports were received from the Claimant’s offender supervisor (who is responsible for progressing his case whilst in custody), his offender manager (who is responsible for managing his risk in the community), the Industries manager and prison staff. Both the offender supervisor, and offender manager recommended the Claimant should be transferred to open conditions. His behaviour appeared to have been exemplary.
11. On 16th April 2019 the Claimant’s (then) solicitors sent representations to the Defendant and requested an oral hearing.
12. On 10th May 2019 the Parole Board directed the case to an oral hearing and made a number of directions for further reports. The directions also required the offender supervisor and offender manager to attend the hearing to discuss their recommendations. The hearing was listed with three members, one of which was a psychologist specialist member.
13. On 7th August 2019 the offender supervisor provided an updated report to the Defendant which expressed continued support for a progressive move to open conditions. Importantly the report also provided an updated account of the Claimant’s contact with his son, (who I shall refer to as B) and daughter, (who I shall refer to as K):

“Mr. Gifford-Hull tells me that he remains in contact with his son and daughter, although they have not visited him for some time. The contact is usually by phone. Mr. Gifford-Hull says that maintaining contact can be difficult as his children’s preference is to use text or email, neither of which he has access to. He informs me that it has been a few months since B his son (aged twenty-three) took a phone call from him. The picture is slightly different with his daughter, who is now aged twenty-six. K is currently studying for her masters, but does take calls from him. Mr. Gifford-Hull tells me that since we last met, he broached with her the subject of his potential progression and for a few months she did not take his calls, although more recently has been back in touch. He speaks of a young woman who is clearly and understandably conflicted about her feelings towards her father, who for much of her life has been in prison. Mr. Gifford-hull understands the importance of giving his children all the time and space they need to adapt to any potential change in his circumstances. Victim Services will be well placed to offer K and B any additional support they need.”

14. On 25th September 2019 the Claimant appeared before the (three member) panel and was represented by Ms Gwinnell of Duncan Lewis Solicitors. The hearing lasted ninety minutes. The offender manager and offender supervisor gave evidence and both supported release. The Claimant gave evidence. At the end of the hearing, the panel adjourned the case to seek further information in relation to victim contact and a review of the case was set for 6th November 2019.
15. On 18th November 2019 the offender manager reported that a new victim personal statement had been received from K together with a non-disclosure application for a victim personal statement from B.
16. The case was further adjourned to 18th December 2019 to enable the information to be provided to the Claimant’s solicitors and for further instructions to be taken from him.
17. The victim personal statement from K was disclosed to him. B’s statement was then subject to the Defendant’s non-disclosure procedures.
18. Licence conditions requesting non-contact between the Claimant and his children were sought by the offender manager. The Claimant’s solicitors filed representations in relation to the victim personal statement from K which objected to a non-contact condition as the Claimant telephoned his daughter twice a week.
19. On 18th December 2019 the Panel considered the application in respect of B’s statement and accepted the Secretary of State submission that the contents of B’s statement should not be disclosed and that a “gist” drafted by the Secretary of State should be served instead; this was provided to the Claimant’s solicitors. This is the first decision under challenge. The record of the decision states:

“An application has been made that certain material should be withheld from Mr Gifford-Hull. The Secretary of State submits that the disclosure of the material to Mr Gifford-Hull would adversely affect the health or welfare of B.

On the evidence available to it, the Panel finds that this is the case. The Secretary of State further submits that withholding the material itself but disclosing a gist of it in the form proposed by the Secretary of State would be a necessary and proportionate measure in the circumstances of the case and would not affect the fairness of the proceedings. On the evidence available to it, the panel finds that this is also the case. The panel accordingly directs that the material should be disclosed to Mr Gifford-Hull but only in the form of the proposed gist.

The material should be served by the Secretary of State on the prisoner’s representative, provided that the representative has first given an undertaking to the Board that they will

not, without the consent of the oral panel chair, disclose it to the prisoner or any other person (see Rule 17(10) of the Parole Board Rules 2019³.”

20. The Rule 17 Direction was sent to the Claimant’s solicitors on 20th December 2020 together with a ‘gist’ of the statement which stated:

“The VPS provides details of the wide reaching psychological and emotional harm the impact of the offences has had on the victim and their family and describes the ongoing impact the offences has had... The VPS concludes by setting out the victim’s fear and concerns at the prospect of the prisoner’s move to open conditions”

21. Within the decision letter of 25th March 2020 it was subsequently stated:

“Following an adjournment, the panel also received further information as set out above, including a VPS from your son. Only a gist of this was disclosed to you, but your legal representative had sight of the material having given the appropriate undertaking”

22. It is the Claimant’s case that, contrary to the position as stated in the panel’s decision letter, the Claimant’s solicitor did not see an unredacted version of B’s victim personal statement. The Claimant’s current solicitor, Mr Tebb, produced a witness statement attaching an e-mail from Ms Gwinnell stating:

“Whilst I am not prepared to give a witness statement, I do want to make it clear that I do not give undertakings to the parole board on the basis that I consider them to be contrary to my professional duty to a client to disclose all information to them about their case unless it would result in someone being placed in imminent danger. That is of course in accordance with our duty under the solicitors code of conduct. I also confirm that I made my position about the undertakings clear to Mr Gifford Hull in a letter I wrote him at the time when the nondisclosure process was being discussed. I did not give the parole board an undertaking and did not see the son’s victim personal statement.”

23. The Defendant has no record of any response to this effect on file and Ms Gwinnell does not state that she informed the panel that she did not think it was possible, due to professional conduct issues, to consider the unredacted statement.

24. The material parts of Rule 17 of the Parole Board Rules 2019 are as follows:

“Withholding information or reports

17.—(1) The Secretary of State and any third party authorised by the Secretary of State (“authorised third party”) may apply to the Board for information or any report (“the material”) to be withheld from the prisoner, or from both the prisoner and their representative, where the Secretary of State or the authorised third party considers—

(a) that its disclosure would adversely affect—

(i) national security;

(ii) the prevention of disorder or crime, or

(iii) the health or welfare of the prisoner or any other person, and

(b) that withholding the material is a necessary and proportionate measure in the circumstances of the case.

...

³ Section 239(5) of the Criminal Justice Act 2003 provides that the Interested Party may make rules with respect to proceedings before the Defendant. The relevant rules for the purposes of this claim are the Parole Board Rules 2019 (SI/2018/1038) which came into force on 22 July 2019.

- (3) Where the Secretary of State or the authorised third party makes an application for the material to be withheld under paragraph (1), the Secretary of State or authorised third party must serve on the Board—
- (a) the material, or a separate document containing the material, and
 - (b) a written application for non-disclosure, explaining why it is proposed to be withheld.
- (4) On receipt of an application under paragraph (3)(b), either a panel chair or duty member appointed for that purpose, must consider the application and may make directions as necessary to enable determination of the application.
- (5) Where the panel chair or duty member is satisfied that all relevant information has been served on the Board, they must consider the application and direct that the material should be—
- (a) served on the prisoner and their representative (if applicable) in full;
 - (b) withheld from the prisoner or from both the prisoner and their representative, or
 - (c) disclosed to the prisoner, or to both the prisoner and the prisoner’s representative (if applicable) in the form of a summary or redacted version.
- (6) If—
- (a) a direction is given under paragraph (5)(a) and the Secretary of State or authorised third party intends to appeal against it in accordance with paragraph (11), or
 - (b) a direction is given under paragraph (5)(b) or (c),
- the Secretary of State, or the Board (where an authorised third party made the application under paragraph (3)), must, as soon as practicable, notify the prisoner and the prisoner’s representative (if applicable) that an application has been made under paragraph (3)(b) and the direction that has been made under paragraph (5).
- (7) If the panel chair or duty member appointed under paragraph (4) gives a direction under paragraph (5)(b) or (c) that relates only to the prisoner, and that prisoner has a representative, the Secretary of State or authorised third party must, subject to paragraphs (10) and (11), serve the material as soon as practicable (unless the panel chair or duty member directs otherwise) on the prisoner’s representative, if the representative is—
- (a) a barrister or solicitor;
 - (b) a registered medical practitioner, or
 - (c) a person whom the panel chair or duty member appointed under paragraph (4) directs is suitable by virtue of their experience or professional qualifications.
- (8) The panel chair or duty member may direct the appointment of a special advocate appointed by the Attorney General to represent the prisoner’s interests where the panel chair or duty member appointed under paragraph (4)—
-
- (b) makes a direction under (5)(b) or (c) that relates to a prisoner and their representative, or the prisoner does not have a representative.
- ..
- (10) The material must not be disclosed to the prisoner’s representative under paragraph (7) unless the prisoner’s representative first gives an undertaking to the Board that the prisoner’s representative will not, without the consent of the panel chair or duty member, disclose it to the prisoner or to any other person.
- (11) Within 7 days of notification by the Secretary of State or Board in accordance with paragraph (6), either party or the authorised third party may appeal against that direction to the Board chair and notify the other party of the application to appeal.
- ..
- (13) Where a direction is made under paragraph (5)(b) or (c) to withhold material from a prisoner who does not have a representative, the decision will automatically be considered in an appeal to the Board chair.”

25. In my judgment (and during submissions Mr Vanderman did not demur) the principle, if not the sole, reason for the mandatory requirement of the disclosure of the full statement to the Claimant's solicitor (or another suitably experienced or professional person) is to allow the representative to evaluate whether or not they consider that the panel can fairly and properly continue without disclosure of the full statement to the claimant and/or to appeal against the direction - whether on grounds of unfairness or that the statement contains content which should not properly be before the panel or otherwise. If the representative does not consider the content of the full statement and these issues the prisoner is potentially worse off than if they had not been represented at all; in which case there would be an automatic review on appeal under Rule 17(13).

26. Here the Claimant did not appeal the Rule 17 Direction as he was entitled to do, pursuant to rule 17(11), rather he made representations based only on the gist as provided. The representations were as follows:

“Mr Gifford-Hull is aware that his son B has submitted a victim personal impact statement and that its contents have been identified as too sensitive to disclose. Mr Gifford-Hull is aware that a non contact licence condition has been requested in relation to B and he wishes to confirm that he respects his son's wishes and will comply with that restriction. Mr Gifford-Hull wishes to say that he is deeply saddened that his relationship with B has deteriorated as it was B rather than his daughter K who was in contact with him when the children were residing [abroad]. He is not sure why that relationship has changed but he wishes to stress that whilst he was hoping to develop his relationship with his son, he respects that is not his decision to make and he respects his son's choice. Mr Gifford-Hull has demonstrated during his time in custody that he is respectful of rules and regulations and he wishes to emphasise that he will adhere and accept the proposed licence condition preventing contact with his son.”

27. On 21st January 2020 the Panel Chair issued further directions and stated:

“In view of the significant discrepancies between the understandings which Mr. Gifford-Hull (expressed in his oral evidence) and his children (expressed in their victim statements) have of their relationship, a psychological report is directed. This should explore, firstly, Mr. Gifford Hull's understanding of the trauma which his children have and do experience, both in relation to his murder of their mother and subsequent events in which they were innocently involved and also in relation to his wish to resume contact with them; and, secondly, his ability to respect his children's independence and need for distance. Whilst risk of violence is not considered significant, the panel wish to consider the possibility of the risk of manipulation and further serious psychological harm. Update reports from OM and OS are also directed in the light of the findings of the psychological report. Further legal representations are invited.”

28. It is important to note that this direction highlighted the “significant discrepancies” between what the Claimant had already stated in his oral evidence about his relationship with his children and what K and B had subsequently set out in their statements about it. The Chair was raising concern about:

- i. the Claimant's understanding of the trauma which his children have and do experience,
- ii. his wish to resume contact with K and B,
- iii. his ability to respect K and B's independence and need for distance and,
- iv. the risk of manipulation and further serious psychological harm

29. Had such a report been prepared the Claimant would have had been likely to have had the chance of putting his views forward in response to questions or at the least would have had sight of the report and its conclusions with an ability to make further representations.

30. On 24th February 2020 a Stakeholder Response form was filed with the Parole Board by a PEC team Leader asking the Panel to consider the comments of Jacob Seaward, forensic Psychologist at HMP Erlestoke, who had considered the Direction for a psychological assessment and responded as follows:

“the psychological report directed is not something Psychology are able to provide to the extent that the Board wishes to understand Mr. Gifford-Hull’s ability to understand specific matters, they would perhaps need to seek a mental capacity assessment. Similarly to the extent that the Board wishes to understand the safeguarding arrangements around Mr. Gifford-Hull’s children, they would need to obtain an opinion from Social Services.”

31. On 11th March 2020, the Panel stated that the direction for the psychological assessment was revoked and that it was satisfied that it had sufficient information to conclude the case on the papers (with the Claimant having an ability to make further written representations). No consideration appears to have been given as to the whether, given that the Claimant had not seen the full statement of B, (which was at such variance with his evidence, that it led to the serious concerns which had already been highlighted in the direction for a psychology report), a further oral hearing was necessary to allow the Claimant to give evidence on the relevant matters.

32. On 25th March 2020 the Panel issued its decision and refused to recommend the Claimant’s transfer to open conditions.

33. Within its decision the panel referred to the Claimant’s statements/evidence about his children. Within her report the offender supervisor stated that the Claimant had stated that he had “less contact with his son” and had not been visited by either of his children recently, and in relation to his son, reduced contact had been because he was “of that age where he would have other interests”. She also recorded that the Claimant had told her that the children had chosen to move to (a city) as they would be closer to the location of the open prison in which would likely to be moved. The panel stated:

“she took this as a sign that they wanted to rebuild relationship with you. She noted, however, that her view of your relationship with your children was only based on your report to her”.

34. The panel noted that up until 2012, the Claimant “did not have much contact with his children at all”. Subsequently the Claimant stated that he had spoken to both K and B about what had happened i.e. the lead up to and circumstances of the murder. The panel continued:

“You said you think your son is happy with the way his life is now. You think he is happy to talk to you. You say he has always been 'very laid back' about things and then you told him you were being considered for open conditions and could possibly come to Bristol on day release, he just said 'oh, cool'. You did not think you being in the community was 'a big deal for him'. You said he has always been 'fairly easy going' with you.”

35. The material part of the Panel’s conclusion was as follows:

“This left the panel to consider the first factor: the progress of the prisoner in addressing and reducing their risk. It is this crucial risk-related factor to which the panel gave the most weight. You have completed HRP which has been described as a ‘turning point’ for you and you were able to articulate the connection between ‘bottling up’ stress, leading to frustration and anger, which ultimately exploded into fatal violence. Both your OS and OM were supporting progression on this basis. However, the panel was concerned that you did not properly understand the impact of your crime on your children, particularly your son. You have either greatly misinterpreted the current position of both your children or chosen to minimise the impact of your offending upon them. The panel was further concerned that you presented, in your evidence, a view of your current family situation which was greatly distanced from reality. It could not tell whether this was a deliberate attempt by you to manipulate and deceive the panel, or whether it was a more innocent misinterpretation constructed by you for whatever reason. The panel did not consider that you understood the trauma which your children have, and do experience, in relation to your murder of their mother, your use of them in the subsequent events and your wish to resume contact with them. The panel also is concerned about your ability to respect your children’s independence and need for distance. The panel considers that you present a high risk of serious psychological harm to your children and, as that risk is not understood, the panel is not satisfied that it can be managed in open conditions. It considers that some work on victim empathy would be of benefit to you.

Overall, the benefits of a move to open conditions did not outweigh the risks. The panel therefore concludes that you are appropriately placed in closed conditions and **makes no recommendation for a progressive move** to open conditions.” (original emphasis)

36. On 2nd April 2020 the Claimant’s then solicitors sent a letter of claim to the Parole Board but his current solicitors are not in receipt of the Board’s response. On 26th May 2020 the Claimant’s current solicitors sent a letter before claim to the Parole Board and on 4th June 2020 the Board responded stating it was *functus officio* and, as a court like body, would remain neutral to any challenge.

Grounds

37. There were three grounds of challenge which can be briefly outlined as follows:
38. Under ground one the Claimant submits that the Defendant’s decision on 18th December 2019 to accede to the Interested Party’s application for non-disclosure of B’s victim personal statement was unlawful as it failed to lawfully apply numerous published policies.
39. Ground two alleges procedural unfairness. The Claimant submitted that by the Defendant failing to disclose the full victim personal statement, but nonetheless relying on it as either evidence, or to inform its risk assessment, it had created an entirely unfair situation. The Defendant did not take adequate steps to mitigate any procedural unfairness the Claimant faced. The Defendant did not put its concerns directly to the Claimant at his hearing, or to any of the professional witnesses involved. The evidence and/or concerns raised by the panel in relation B’s statement were never properly tested. As a result, the proceedings and its final decision, based primarily on untested information or evidence, were marred by procedural unfairness.

40. Under ground three the Claimant alleges irrationality in relation to the final decision.
41. For reasons which I shall set out in due course grounds one and three were withdrawn during the hearing.

Procedural history of the claim

42. On 17th August 2020, His Honour Judge Lambert ordered the defendant to serve on the court alone as closed material:
- (i) the application for non-disclosure,
 - (ii) B's statement,
 - (iii) the record of decision in relation to non-disclosure of the above items.
43. On 26th August 2020, the Claimant made an application for variation of the order, seeking that the Attorney General be notified of the claim, that the court appoint a special advocate to represent the claimant's interests and subsequent case management directions.
44. On 16th September 2020 His Honour Judge Lambert made an order that the parties should notify the court of any application they consider had not been addressed. Further that the closed material received by the Court should not be disclosed and should not be disclosed in the future without the matter being referred to the Defendant for further representations as to the public interest. If disclosure was contemplated, consideration should be given to adding the witness as an interested party. He also refused the Claimant's application for the appointment of a special advocate.
45. On 16th October 2020 His Honour Judge Lambert granted permission.

Legal framework

46. The Interested Party refers cases to the Defendant via section 239(2) of the Criminal Justice Act 2003. Under this section the Defendant is empowered to advise the Interested Party and make a recommendation that a prisoner is transferred to open conditions. In doing so the Defendant is bound to follow the Interested Party's directions on the transfer of life sentenced prisoners to open conditions published in April 2015. Those directions set out a number of factors that fail to be considered by the Defendant in making a recommendation.
47. As Lord Bingham stated in **R (Roberts) v the Parole Board** [2005] 2 A.C. 738 (at paragraph 13) the Parole Board is obliged to act in a manner that is procedurally fair. He approved the statement in **R (West)-v-Parole Board** [2005] 1 WLR 350 (at paragraph 35) that:

“The prisoner should have the benefit of a procedure which fairly reflects, on the facts of his particular case, the importance of what is at stake for him, as for society”

48. In **Re D (Minors) (Adoption Reports : Confidentiality)** [1996] AC 593, Lord Mustill (with the agreement of all the members of the House) stated that it was:

“A first principle of fairness that each party to a judicial process shall have an opportunity to answer by evidence and argument any adverse material which the tribunal may take into account when forming its opinion. This principle is lame if the party does not know the substance of what is said against him (or her), for what he does not know he cannot answer”

49. As Lord Bingham observed in **R (Roberts)** the requirement for procedural fairness does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. He said it was a proposition vouched by a compelling authority that decision making procedures may, so long as they are fair, be adapted to take account of interests other than those of the Defendant, prisoner or applicant.

50. In **R (Osborn and Booth) v Parole Board** [2014] A.C. 1115 the Supreme Court gave guidance about the circumstances in which the Parole Board was required to hold an oral hearing in order to comply with its common law duty of fairness and article 5(4) of the European Convention on Human Rights when determining a prisoner's application for release or transfer to open prison conditions. Lord Reed provided the substantive judgment (with whom Lord Neuberger, Lady Hale, Lord Kerr and Lord Clarke agreed). He summarised the conclusions he reached as to when the Parole Board should hold an oral hearing at paragraph 2:

“(ii) It is impossible to define exhaustively the circumstances in which an oral hearing will be necessary, but such circumstances will often include the following.

- (a) Where facts which appear to the board to be important are in dispute, or where a significant explanation or mitigation is advanced which needs to be heard orally in order fairly to determine its credibility. The board should guard against any tendency to underestimate the importance of issues of fact which may be disputed or open to explanation or mitigation.
 - (b) Where the board cannot otherwise properly or fairly make an independent assessment of risk, or of the means by which it should be managed and addressed. That is likely to be the position in cases where such an assessment may depend on the view formed by the board (including its members with expertise in psychology or psychiatry) of characteristics of the prisoner which can best be judged by seeing or questioning him in person, or where a psychological assessment produced by the Ministry of Justice is disputed on tenable grounds, or where the board may be materially assisted by hearing evidence, for example from a psychologist or psychiatrist. Cases concerning prisoners who have spent many years in custody are likely to fall into the first of these categories.
 - (c) Where it is maintained on tenable grounds that a face-to-face encounter with the board, or the questioning of those who have dealt with the prisoner, is necessary in order to enable him or his representatives to put their case effectively or to test the views of those who have dealt with him.
 - (d)
- (iii) In order to act fairly, the board should consider whether its independent assessment of risk, and of the means by which it should be managed and addressed, may benefit from the closer examination which an oral hearing can provide.
- (iv) The board should also bear in mind that the purpose of holding an oral hearing is not only to assist it in its decision-making, but also to reflect the prisoner's legitimate interest in being able to participate in a decision with important implications for him, where he has something useful to contribute.
- (v) The question whether fairness requires a prisoner to be given an oral hearing is different from the question whether he has a particular likelihood of being

released or transferred to open conditions, and cannot be answered by assessing that likelihood.

- (vi) ..
- (vii) The board must be, and appear to be, independent and impartial. It should not be predisposed to favour the official account of events, or official assessments of risk, over the case advanced by the prisoner.
- (viii) The board should guard against any temptation to refuse all hearings as a means of saving time, trouble and expense
- (ix) The board's decision, for the purposes of this guidance, is not confined to its determination of whether or not to recommend the prisoner's release or transfer to open conditions, but includes any other aspects of its decision (such as comments or advice in relation to the prisoner's treatment needs or the offending behaviour work which is required) which will in practice have a significant impact on his management in prison or on future reviews.....
- (x) ..
- (xi) ..
- (xii) The common law duty to act fairly, as it applies in this context, is influenced by the requirements of article 5.4 as interpreted by the European Court of Human Rights. Compliance with the common law duty should result in compliance also with the requirements of article 5.4 in relation to procedural fairness.
- (xiii) A breach of the requirements of procedural fairness under article 5.4 will not normally result in an award of damages under section 8 of the Human Rights Act 1998 unless the prisoner has suffered a consequent deprivation of liberty."

51. In relation to procedural fairness Lord Reed (with whom the other Justices agreed) also held that:

- i. the Court must itself determine whether a fair procedure was followed. Its function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required⁴
- ii. one of the virtues (but not the sole virtue) of procedurally fair decision-making is that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested.

52. As for the consequences of procedural unfairness in **Reg. v Chelsea College of Art & Design, ex p. Nash** [2000] ELR 686, Elias J (as he then was) stated⁵:

"... It has been urged on me that even if there were defects in the procedure they would have made no difference to the outcome. This is an argument that is very rarely accepted by the courts, for obvious reasons. It must be in the very plainest of cases, and only in such cases, where one can say that the breach could have made no difference. In my opinion it is not possible in this case to say that the committee's decision would inevitably have been the same even if the committee had acted in accordance with its legal obligations."

53. In **R (Clegg) v Secretary of State for Trade and Industry** [2002] EWCA Civ 519 Chadwick LJ held that, once procedural unfairness has been established:

"I accept that it is not necessary for the appellant to show that the outcome would have been different if the appellant had responded to the provisional criticisms. I accept that, if procedural unfairness is established, it would be enough to show that, but for that procedural unfairness, the outcome might have been different"⁶

⁴ See paragraph 65.

⁵ Paragraph 50.

⁶ Paragraph 30.

Ground 2

54. It is the Claimant's case that the Defendant's decision was "marred by procedural unfairness".
55. Mr Withers submitted that the Defendant failed to adequately consider the need for the Claimant to be able to challenge the evidence and/or information contained within his son's victim personal statement and how the effects of non-disclosure could be mitigated. The service of the gist by the Defendant and the ability to make written representations were not sufficient to cure the unfairness caused by a lack of knowledge of the detailed content of the statement. He argued:

"The Claimant gave evidence at his oral hearing on 25th September 2019 regarding his relationship with his children. He was not provided with the opportunity to give oral evidence again to the panel, despite the panel's concerns raised by the victim personal statement. Further, the concerns were not put to the professional witnesses in oral evidence. As these concerns were arguably fundamental to the Claimant's application for a progressive move, the panel were required to put them to him at a further reconvened oral hearing so they could be properly tested.

Analysis

56. In his oral evidence to the Board, the Claimant explained how his son was happy with life, happy to talk to him, had always been "very laid back" and had probably not been in contact recently because he was at the age where he had other interests. The Claimant stated that in his view he did not think him being in the community was "a big deal" for his son. Neither the offender supervisor nor the offender manager gave evidence to the contrary.
57. Without descending into any detail as to the content of B's statement, and as is plain from the comments of the Board in its direction as to a psychologist's report and its final decision, its content was at direct variance to his father's evidence. B powerfully describes being anything but laid back about what had happened to his mother and the severe impact which the very traumatic experience had upon him. The divergence understandably concerned the Board well before the final decision was reached.
58. In addressing the question whether, in any case, the procedure has been such as to breach a prisoner's rights under the common law by compromising his ability effectively to test or challenge evidence which bears upon the legality of his continued detention, it is necessary to look at the proceedings as a whole. Where a decision has been taken by the Board using a procedure which involves significant injustice to the prisoner, then this Court will quash that decision, if the Board might not have arrived at the same decision had a fair procedure been followed.
59. Where a Rule 17 direction has been made a fair procedure requires the panel Chair or full panel, to carefully consider directions with regard to the material, in particular steps to mitigate the effects of any non-disclosure. Such considerations

are necessarily case and fact specific. What was adequate and fair in one case may not be in another.

60. Here the Chair had to consider the effect of the disclosure of only the gist of B's statement, in circumstances where the full statement presented such a very different picture to that previously given by the Claimant, such as to give rise to the expressed concerns underpinning the direction for a psychologist's report.
61. It was necessary to consider if the effect of the inability to address its full content could and should be mitigated in any way beyond the provision of its gist.
62. The first step which the Board took was to seek to obtain a psychologist report into the issues of concern which arose solely by virtue of B and K's statements. The Claimant was likely to have had direct input into the compilation of such report; probably having been questioned about his views of the trauma to his children and its effects, but in any event it would have been disclosed to him and he could then have made representations as to its content. Whether or not that might have been sufficient to amount to a fair procedure is academic because it quickly became apparent that route was not open to the Board.
63. Once it was appreciated that the Panel would get no further information through the route of a psychologist report, it is my view that it was an obvious and necessary step to allow the Claimant to give further oral evidence on the issues raised by the statement and, as a result, to provide an opportunity to directly address the Panel's obvious concerns. The duty was on the Board, given the Claimant had not seen the full statement, to ensure that there was a fair opportunity to respond to the issues raised. The Board needed to take a view as to his credibility and/or ability to understand the damage that he had caused to his children and how they felt about him and to do so they needed to hear, and then evaluate, what he had to say.
64. Simply proceeding to determine the matter on the papers was not in my view sufficient to give the Claimant a fair opportunity to deal with issues which were causing concern to the Panel (and about which he had no detailed knowledge), including, but not limited to:
 - a) the Claimant's understanding of the trauma which his children had experienced and its effects (given the sharp variance between the picture painted by the Claimant and that set out by B)
 - b) his wish to resume contact with K and B
 - c) his ability to respect K and B's independence and need for distance (which requires him to appreciate the damages caused by the trauma which they had experienced)
 - d) whether he has tried in the past, or may seek, in the future, to manipulate his son and daughter
 - e) whether he appreciates that further serious psychological harm could be caused if he attempted to contact/contacted his son.
65. The variance between the Claimant's oral evidence and B's statement underpinned the Board's conclusion. It was stated that (given what B had said) the Claimant was "distanced from reality" and either did not understand the impact the murder had on his children or chose to misinterpret or manipulate the true position to the Board. As a result of not understanding, or deliberately underplaying, the impact that the death of their mother at his hands had upon K and B, and the damage it had caused, and

continued to cause, the Panel was concerned that he would not respect his children's need for independence, i.e. to contact them or attempt to contact them and that as a result there was a serious risk of psychological harm. So, the issue of how the Claimant could have arrived at the view that essentially all was well with his son (if he ever did) was a central consideration which the panel decided, in effect, "against" the Claimant without giving him a proper opportunity to deal with the issue.

66. Looking at the process as a whole, I find that the procedure adopted by the Defendant in the present case is unfair and involved significant injustice to the Claimant.
67. I was initially troubled by the effect of the direction that B's full statement should be released to his solicitor and the fact that no objection had been raised to the procedure. This gives rise to the question as to whether the Claimant had waived the defect in procedure.
68. After having heard submissions, I am satisfied that it would be wrong to decide that, on the facts of this case as presented to me, the Claimant should be found to have waived his right to subsequently challenge the unfair procedure.
69. The Claimant's solicitor refused to view the full statement for the reason which she set out in her e-mail. I cannot properly determine in this hearing whether she was right, or duty bound, to do so or not. I was informed by Mr Withers and Mr Vanderman that this approach has been taken on other occasions, although they differed in their experience as to how commonly the stance was taken. In my view it is important, given that Rule 17 expressly provides for release to legal representative that the Law Society and Bar Council consider the issue and provide professional guidance on the issue. In any event, and in the interim, it is very important that any representative (legally qualified or otherwise) communicates to the Board that they do not feel properly able to view the full statement, so the consideration can be given as to how the matter can fairly proceed. I do not know whether that happened in the present case or not. Certainly, the Panel should have been aware of the lack of the required undertaking. Given that the full statement was not considered by either the Claimant or his representative, there cannot have been a decision to continue on without oral evidence taken with the benefit of a full appreciation of extent to which it flatly contradicted the Claimant's assessment in his oral evidence. I accept Mr Wither's submission that the Claimant would have had to have had a great deal of foresight to know that the content of the statement could affect the panel's assessment of risk as it subsequently did.
70. Also the Court is entitled, subject to the facts in a particular case, to take a more benign view of the failure to object to the proposed procedure of the Parole Board, given the overriding duty of the Board to ensure that there is a fair procedure where the Claimant has not had sight of all relevant material. The decision to object requires consideration and balancing of a number of competing factors and, as I have already stated, the Claimant cannot easily weigh up the potential impact of a statement which he has not seen. In my judgment there is a more substantial entitlement than there may be in other circumstances, to rely upon the good judgment and experience of the Board, that the procedure it proposes can fairly deal with the issues in a particular case. This view is in line with the approach taken by Hickinbottom J (as he then was) in **R (Rowe) v Parole Board** [2012] EWHC 1272 (Admin), and also other cases such as **R (Headley) v Parole Board** [2009] EWHC

663 (Admin), **R (Wezka) v Parole Board** [2012] EWHC 827 (Admin), **R (West) v Parole Board** [2003] 1 WLR 705 and **R (Grinham) v the Parole Board** [2020] EWHC 2140 (Admin).

71. It is necessary to be cautious when considering the issue of what may have happened had a fair procedure been adopted. The Board was greatly influenced by the variance between B's statement and the oral evidence of the Claimant. The Claimant may have been able to explain or shed light on that variance and/or satisfy the Board that he could respect his children's need for independence and not contact them. I am satisfied that the Claimant has cleared the relatively low threshold that the outcome might have been different.
72. By reason of the matters set out above I accept that there was procedural unfairness and that the outcome might have been different, so ground two succeeds and the decision must be quashed.
73. Upon my indication after submissions upon ground two that it was successful, Mr Withers withdrew grounds one and three and it is not necessary for me to deal with them. It would not be appropriate for me to go on to try and give general guidance on issues that may have arisen from their detailed consideration.

Remedy

74. The Claimant is entitled to a declaration that the decision of the Defendant was marred by procedural unfairness and an order quashing the Defendant's decision dated 25 March 2020, requiring the Defendant to remit the Claimant's case before a fresh panel for an oral hearing.
75. Mr Withers submitted that the order should require that the case be remitted for consideration with expedition and a timescale set of three months. He submitted that there is precedent to do so as demonstrated by the following authorities: **R (Davies) v Parole Board** [2015] 4276 (Admin); **R (Khan) v Parole Board** [2015] EWHC 2528 (Admin) and **R (Grinham) v Parole Board** [2020] EWHC 2140.
76. Mr Vanderman submitted that it would be wrong to order reconsideration within a set period. He stated that at present matters were currently being listed three months ahead.
77. When considering whether to set a time limit for a reconsideration each case must turn upon its facts which include the circumstances of the Claimant and the resources of the Board. In **Grinham** the Claimant, who had cancer, was due for release in five months in any event. In **Khan** the age of the matter was a concern. And in both **Khan** and **Davies** the length of time the Claimant had spent in prison after expiry of the minimum terms was a pressing consideration. The Claimant is in a different position in that his tariff expires on 5th October 2022. There is also the effect of the pandemic to be considered (which may impact upon the availability of staff at prison and Board members). Also, what is suggested is broadly in line with what the Board is managing without the need for an order. Given these factors, I am not persuaded that it is appropriate to set a timescale, although I will order that the hearing should be expedited to ensure that it does not fall to the back of the queue.

78. The parties are to make written submissions as to costs.